

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 MICHELLE R. AHRENDT, )  
7 Plaintiff, ) No. CV-11-0171-LRS  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

---

13 **BEFORE THE COURT** are cross-motions for summary judgment,  
14 noted for hearing without oral argument. Attorney Lora Stover  
15 represents Plaintiff; Special Assistant United States Attorney  
16 David Burdett represents the Commissioner of Social Security  
17 (Defendant or Commissioner). After reviewing the administrative  
18 record and the briefs filed by the parties, the court **GRANTS**  
19 Defendant's motion for summary judgment, **ECF No. 14**.

20 **JURISDICTION**

21 Plaintiff applied for supplemental security income (SSI)  
22 under Title XVI of the Social Security Act, 42 U.S.C. §§  
23 1381-1383f on October 27, 2008 and November 15, 2006 respectively.  
24 She alleged disability as of June 12, 2008 (Tr. 83, 190). The  
25 application was denied initially on December 10, 2008 and upon  
26 reconsideration, April 17, 2009 (Tr. 145-55, 161-62).

27 At a hearing before Administrative Law Judge (ALJ) James W.  
28

1 Sherry on November 12, 2009, Plaintiff, represented by counsel,  
2 and a vocational expert testified (Tr. 83). At the beginning of  
3 the hearing, Plaintiff's counsel requested a consultative  
4 psychiatric/psychological examination which was denied based on  
5 absence of medically determinable mental impairments as determined  
6 by James Bailey, PhD. (Tr. 83). On December 2, 2009, the ALJ  
7 issued an unfavorable decision (Tr. 83-93). The Appeals Council  
8 denied review on November 24, 2010 (Tr. 1-3), making the ALJ's  
9 decision the final decision of the Commissioner. Plaintiff filed  
10 this action for judicial review pursuant to 42 U.S.C. § 405(g) on  
11 April 28, 2011 (ECF No. 2).

#### 12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing  
14 transcript, the ALJ's decision, and the briefs of the parties.  
15 This court will adopt those facts and provide a brief summary.

16 Plaintiff was 48 years old at the hearing. She went to school  
17 through the twelfth grade, and she reports some special education  
18 classes. She has worked as a caregiver in an adult family home,  
19 meat cutter, housekeeping/cleaner, production work and packaging  
20 (Tr. 110, 112-16). She last worked October 27, 2008 but stopped  
21 due to an injury (Tr. 112). Plaintiff testified she was in the  
22 process of getting a driver's license (Tr. 108) but her son  
23 reported that when she goes out she drives a car (Tr. 295). She  
24 lives with a friend in an apartment next to her ex-husband and one  
25 grown son. (Tr. 108, 126). She states she is able to cook for  
26 herself, do some cleaning (Tr. 118, 125-26). She states she can  
27 do crossword puzzles and is able to hold a pen and write for about  
28 half an hour. (Tr. 117-18). She can clean most pots and pans, if

1 not too heavy, but has difficulty lifting a gallon of milk with  
2 her right hand. (Tr. 118). She states that she has low back pain  
3 that requires her to use Ben Gay creme and lay down for about 20  
4 minutes. (Tr. 119). She states she has an asthma condition with  
5 symptoms triggered by stress, smoking, and cats and treated by  
6 using a nebulizer. (Tr. 124, 128). Plaintiff indicates she  
7 smokes almost a pack per day and lives with a cat, the latter  
8 which she is allergic to. (Tr. 124, 128). She states that she is  
9 5'4" tall and weighs 203 pounds, and has gained about 40 pounds  
10 since June 2008 when she was injured. (Tr. 107).

#### 11 **ALJ'S FINDINGS**

12 At step one the ALJ found Plaintiff did not engage in  
13 substantial gainful activity since October 27, 2008, the  
14 application date (Tr. 85). At step two he found Plaintiff suffers  
15 from the following severe impairments: multi-level thoracic  
16 degenerative disc disease; multi-level lumbar degenerative disc  
17 disease; asthma and/or acute bronchitis; right foot heel spur and  
18 pes cavus (high arch); right wrist degeneration; obesity; and a  
19 history of epilepsy. (Id.). At step three, the ALJ found the  
20 impairment did not meet or equal a Listed impairment (Tr. 87).  
21 The ALJ based this finding on a thorough review of the medical  
22 evidence and testimony of Plaintiff. (Id.). At step four, the  
23 ALJ found Plaintiff had an RFC to perform light work as defined in  
24 20 CFR 416.967(b) except there should be normal breaks with  
25 unlimited pushing and pulling within the lifting restrictions.  
26 Further, the Plaintiff should never climb ladders, rope or  
27 scaffolds; only occasionally climb ramps or stairs; and only  
28 occasional balancing, stooping, crouching, kneeling, crawling.

1 The ALJ found the Plaintiff should avoid concentrated exposure to  
2 excessive vibration, specifically the repetitive use of vibrating  
3 tools with her right hand; avoid concentrated exposure to  
4 unprotected heights and moving machinery. (Id.).

5 The ALJ concluded that based on the numerous inconsistencies  
6 between the Plaintiff's testimony and the evidence of record,  
7 together with the well-supported opinions of examining physicians,  
8 non-medically accepted sources, and State agency medical  
9 consultants, Plaintiff's subjective complaints and alleged  
10 limitations are not fully persuasive and she retains the ability  
11 despite her impairments to perform work activities with the  
12 limitations set forth.

13 The ALJ relied on a vocational expert's testimony at the  
14 hearing and concluded that Plaintiff is capable of performing past  
15 relevant work as a housekeeper/cleaner and hand packager, and  
16 found such work did not require the performance of work-related  
17 activities precluded by Plaintiff's RFC. (Tr. 92-93).

### 18 19 **ISSUES**

20 Plaintiff alleges the ALJ erred in not ordering a  
21 consultative psychological examination in view of Plaintiff's  
22 chronic pain and thus did not fully develop the record (ECF No. 13  
23 at 10).

24 Plaintiff also alleges the ALJ erred in assessing the  
25 Plaintiff's residual functional capacities. *Id.*

26 Plaintiff finally alleges the ALJ failed to pose a proper  
27 hypothetical to the vocational expert. *Id.*

28 Plaintiff concludes that the evidence taken from the record

1 as a whole does not support the Defendant's decision that  
2 Plaintiff is not disabled.

3 The Commissioner disagrees, asserting the ALJ's decision is  
4 supported by substantial evidence and free of legal error. The  
5 Commissioner asks the Court to affirm the Agency's final decision  
6 that Plaintiff was not disabled under the Social Security Act (ECF  
7 No. 14 at 2).

### 8 DISCUSSION

#### 9 **A. Psychological Consultation--Plaintiff's Chronic 10 Pain/Mental Limitations**

11 Plaintiff alleges that the ALJ did not fully and fairly  
12 develop the record by failing to order a consultative  
13 psychological examination in view of Plaintiff's chronic pain.  
14 (ECF No. 13 at 10).

15 The Commissioner, on the other hand, asserts that an ALJ's  
16 duty to develop the record further "is triggered only when there  
17 is ambiguous evidence or when the record is inadequate to allow  
18 for proper evaluation of the evidence." *Mayes v. Massanari*, 276  
19 F.3d 453, 459-460 (9th Cir. 2001). The Commissioner argues that  
20 the ALJ's citation of multiple reasons for finding Plaintiff less  
21 than fully credible as to her subjective symptom testimony  
22 supports the finding that Plaintiff retains the ability, despite  
23 subjective complaints of chronic pain, to perform work activities  
24 with limitations. (Tr. 88-92). Previously, Plaintiff had been  
25 referred to a "pain clinic" evaluation but was rejected as a  
26 candidate due to "pain disorder and malingering, drug seeking  
27 behavior, lack of cooperation, symptom magnification, hostile  
28 attitude, defensiveness and inconsistent/unreliable responses to

1 questions." (Tr. 691-98). The Pain Rehabilitation Program Team  
2 concluded that Plaintiff was clearly not an appropriate candidate  
3 and should return to work. (Tr. 698). Additionally, there is  
4 evidence that Plaintiff declined to participate in a pain clinic  
5 in September 2009. (Id.) At the hearing, Plaintiff testified  
6 that the only pain medications she had taken was an aspirin for a  
7 headache that week. (Tr. 92).

8 The ALJ also addressed Plaintiff's depression and found it  
9 had no bearing on her vocational prospects (Tr. 87). Evidence  
10 also included the report of examining psychologist W. Greene,  
11 Ph.D., who declined to diagnose Plaintiff with depression or  
12 anxiety because she had only "mild symptoms." (Tr. 64).

13 This Court finds that Plaintiff's contention that the ALJ  
14 failed to evaluate and consider her depression and chronic pain  
15 when defining Plaintiff's residual functional capacity is  
16 unfounded. The ALJ's decision has considered Plaintiff's  
17 depression and allegations of chronic pain. The ALJ did not err,  
18 by not ordering a consultative psychological examination or by  
19 finding:

20 Three factors weigh against considering the  
21 claimant's allegations to be strong evidence  
22 in favor of finding her disabled. First, any  
23 limitations she described at hearing and in  
24 her application cannot be objectively verified  
25 with any reasonable degree of certainty with  
26 objective medical facts or diagnostic testing.  
27 Secondly, if she was as limited as alleged, it  
28 is difficult to attribute that degree of  
limitation to the claimant's medical  
conditions, as opposed to other reasons, in  
view of the relatively weak objective medical  
evidence and other factors discussed in this  
decision. Third, claimant's symptoms or  
combination of symptoms alone cannot be the  
basis for a finding of impairment without  
medical signs and/or laboratory findings

1 demonstrating the existence of the physical or  
2 mental impairment.  
(Tr. 91).

3  
4 Plaintiff also argues that the ALJ improperly discounted the  
5 opinions of Dr. Terrence D. Remple, M.D., her primary care  
6 provider. The Commissioner asserts that the ALJ thoroughly  
7 evaluated this physician's opinions (Tr. 90-91). This Court agrees  
8 that the ALJ did not discount the opinions of Dr. Remple. In  
9 support of the ALJ's decision, Dr. Remple who is Board Certified  
10 in Occupational Medicine, noted in his "Plan" on October 21, 2009  
11 that Plaintiff could return to work, as he found that she was  
12 capable of full time gainful employment (Tr. 794). Dr. Remple  
13 also approved of the job descriptions for housekeeper and care  
14 giver, although he noted that she has some symptoms from her  
15 wrist. *Id.* In an earlier assessment on April 23, 2009, it was  
16 Dr. Remple's opinion that although Plaintiff had some limitation  
17 on handling in her right wrist, she was able to return to work  
18 despite the right wrist symptoms. (Tr. 810). The ALJ has  
19 incorporated Plaintiff's right hand symptoms into his RFC  
20 assessment, which is evidence he has not discounted Dr. Remple's  
21 opinions.

22 **B. Hypothetical to the Vocational Expert**

23 Plaintiff contends that the ALJ's residual functional  
24 capacity finding is not supported by substantial evidence and that  
25 his questioning of the vocational expert was improper. Plaintiff  
26 argues that the ALJ should have posed a different vocational  
27 hypothetical to the vocational expert. Plaintiff states the  
28 hypothetical question did not fully represent Plaintiff's physical

1 impairments, nor did it accurately portray her psychological  
2 impairment and her pain complaints. Plaintiff does not suggest,  
3 however, what evidence the ALJ allegedly should have posed in that  
4 hypothetical. Plaintiff concludes that well established Ninth  
5 Circuit case law requires hypothetical questions posed to  
6 vocational expert be complete in order for the Defendant to rely  
7 upon such expert's responses concerning work available for the  
8 hypothetical person. (ECF No. 13 at 15).

9 The Commissioner responds that the hypothetical to the  
10 vocational expert contained all the limitations that the ALJ found  
11 credible and supported by substantial evidence in the record.  
12 Therefore, the ALJ's reliance on the testimony of the expert  
13 responding to the hypothetical here was proper under *Bayliss v.*  
14 *Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

### 15 C. Applicable Law

16 Disability Insurance Benefits are paid to disabled persons  
17 who have contributed to the Social Security program, 42 U.S.C. §  
18 401 et seq. Supplemental Security Income ("SSI") is paid to  
19 disabled persons with low income. 42 U.S.C. § 1382 et seq. Under  
20 both provisions, disability is defined, in part, as an "inability  
21 to engage in any substantial gainful activity" due to "a medically  
22 determinable physical or mental impairment." 42 U.S.C. §§  
23 423(d)(1)(a) & 1382c(a)(3)(A). A five-step sequential evaluation  
24 governs eligibility for benefits. See 20 C.F.R. §§ 423(d)(1)(a),  
25 416.920 & 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107  
26 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The following summarizes the  
27 sequential evaluation:

28 Step one: Is the claimant engaging in



substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.

Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App.1? If so, the claimant is automatically determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

*Lester v. Chater*, 81 F.3d 821, 828 n. 5 (9th Cir.1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. *Bowen*, 482 U.S. at 146 n. 5. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. *Id.*

#### **D. Standard of Review**

The court reviews the Commissioner's decision to determine whether (1) it is based on proper legal standards under 42 U.S.C. § 405(g), and (2) substantial evidence in the record as a whole supports it. *Copeland v. Bowen*, 861 F.2d 536, 538 (9th Cir.1988) (citing *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 575-76 (9th Cir.1988)). Substantial evidence means more than a mere scintilla of evidence, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521 (9th Cir.1996) (citing *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir.1975)). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402

1 U.S. 389, 402, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (quoting  
2 *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S.Ct.  
3 206, 83 L.Ed. 126 (1938)). The record as a whole must be  
4 considered, *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir.1986),  
5 and both the evidence that supports and the evidence that detracts  
6 from the ALJ's conclusion weighed. See *Jones v. Heckler*, 760 F.2d  
7 993, 995 (9th Cir.1985). The court may not affirm the ALJ's  
8 decision simply by isolating a specific quantum of supporting  
9 evidence. *Id.* If substantial evidence supports the administrative  
10 findings, or if there is conflicting evidence supporting a finding  
11 of either disability or nondisability, the finding of the ALJ is  
12 conclusive, see *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th  
13 Cir.1987), and may be set aside only if an improper legal standard  
14 was applied in weighing the evidence, see *Burkhart v. Bowen*, 856  
15 F.2d 1335, 1338 (9th Cir.1988).

#### 16 **E. Analysis**

17 This Court finds the ALJ's RFC assessment was reasonable and  
18 consistent with the objective medical evidence, Plaintiff's  
19 testimony, and the credibility assessment. The ALJ noted in his  
20 decision reasons for rejecting Plaintiff's subjective complaints  
21 of impairment. The ALJ further discredited Plaintiff's complaints  
22 of pain, depression and asthma symptoms by noting examples of  
23 medical evidence showing a history of non-compliance, self-  
24 limiting and pain behavior. (Tr. 89).

25 Plaintiff also contends the ALJ's examination of the  
26 vocational expert was improper and insufficient. Hypothetical  
27 questions posed to a vocational expert must set out all the  
28 substantial, supported limitations and restrictions of the

1 particular claimant. *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th  
2 Cir.1989). If a hypothetical does not reflect all the claimant's  
3 limitations, the expert's testimony as to jobs in the national  
4 economy the claimant can perform has no evidentiary value.  
5 *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir.1991). While the  
6 ALJ may pose to the expert a range of hypothetical questions,  
7 based on alternate interpretations of the evidence, the  
8 hypothetical that ultimately serves as the basis for the ALJ's  
9 determination must be supported by substantial evidence in the  
10 record as a whole. *Embrey v. Bowen*, 849 F.2d 418, 422-23 (9th  
11 Cir.1988).

12 The ALJ commenced his examination of the vocational expert by  
13 requesting the expert to identify Plaintiff's past work within the  
14 last 15 years. (Tr. 132-33). The ALJ then presented the expert  
15 with two hypotheticals, which included all the limitations the ALJ  
16 assessed, but differing in categories. (Tr. 133-34). The expert  
17 then clarified the hypotheticals. (Tr. 133). After responding to  
18 the clarified hypotheticals, the vocational expert then identified  
19 several past jobs available to Plaintiff that would accommodate  
20 even further limitations for the sedentary category, as identified  
21 by the ALJ, including lifting no more than ten pounds at a time,  
22 occasional lifting or carrying articles like files, ledgers and  
23 small tools, stand or walk for two hours in an eight-hour day, sit  
24 for up to six hours in an eight-hour day. (Tr. 134-35). The  
25 expert testified that all the past work exceeded this sedentary  
26 category, but the expert found there would be other work such a  
27 person could perform. The ALJ then requested the expert to  
28 consider Plaintiff's testimony about her limitations. The expert

1 found that Plaintiff would not be able to perform her past work or  
2 any other work if she had to constantly change positions, high  
3 levels of pain and discomfort from lifting. (Tr. 136-37).

4 The hypotheticals posed by the ALJ, however, included all  
5 limitations found by the ALJ to be supported by substantial  
6 evidence. As discussed above, the ALJ found that Plaintiff's  
7 allegations of chronic pain and depression were not fully credible  
8 based on the absence of medical evidence supporting the  
9 allegations and inconsistent information provided by Plaintiff  
10 throughout the record. There was no error in the ALJ's reliance  
11 on the testimony of the vocational expert. The ALJ's decision is  
12 fully supported by substantial evidence in the record and based on  
13 the proper legal standards.

14 **F. Conclusion**

15 On the facts presented here, Plaintiff has failed to show  
16 that the ALJ's RFC assessment and findings regarding Plaintiff's  
17 alleged limitations were in error. Plaintiff does not  
18 successfully challenge the finding of questionable credibility.

19 Having reviewed the record and the ALJ's conclusions, this  
20 Court finds that the ALJ's decision is free of legal error and  
21 supported by substantial evidence.

22 **IT IS ORDERED:**

23 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is  
24 **GRANTED**.

25 2. Plaintiff's Motion for summary Judgment, **ECF No. 12**, is  
26 **DENIED**.

27 ///

28 ///

1 The District Court Executive is directed to file this Order,  
2 provide copies to counsel, enter judgment in favor of defendant,  
3 and **CLOSE** this file.

4 DATED this 14th day of December, 2012.

5  
6 ***s/Lonny R. Suko***

7  
8 

---

LONNY R. SUKO  
UNITED STATES DISTRICT JUDGE